# UNITED STATES PATENT AND TRADEMARK OFFICE

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| 10/654,360 | 09/03/2003 | Thomas E. Creamer | BOC9-2003-0003  (372) | 4216 |

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| EXAMINER |
|---|
| TO, JENNIFER N |

| ART UNIT | PAPER NUMBER |
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| 2195 | |

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

*-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --*

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE <u>3</u> MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.
- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
  Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1)☒ Responsive to communication(s) filed on *12 June 2008*.
2a)☐ This action is **FINAL**.          2b)☒ This action is non-final.
3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4)☒ Claim(s) *1,13 and 18* is/are pending in the application.
    4a) Of the above claim(s) _____ is/are withdrawn from consideration.
5)☐ Claim(s) _____ is/are allowed.
6)☒ Claim(s) *1,13 and 18* is/are rejected.
7)☐ Claim(s) _____ is/are objected to.
8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

**Application Papers**

9)☒ The specification is objected to by the Examiner.
10)☒ The drawing(s) filed on *03 September 2003* is/are: a)☒ accepted or b)☐ objected to by the Examiner.
    Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
    Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
    a)☐ All   b)☐ Some *  c)☐ None of:
      1.☐ Certified copies of the priority documents have been received.
      2.☐ Certified copies of the priority documents have been received in Application No. _____ .
      3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
    * See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08)
    Paper No(s)/Mail Date <u>05/21/2004</u>.

4) ☐ Interview Summary (PTO-413)
    Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____ .

## DETAILED ACTION

1.      This office action is responding to the preliminary amendment filed

06/12/2008.

2.      Claims 1, 13, and 18 are presented for examination.

3.      Claims 2-12, 14-17, and 19-30 are cancelled by applicant.

### *Double Patenting*

4.      The nonstatutory double patenting rejection is based on a judicially

created doctrine grounded in public policy (a policy reflected in the statute) so as

to prevent the unjustified or improper timewise extension of the "right to exclude"

granted by a patent and to prevent possible harassment by multiple assignees.

A nonstatutory obviousness-type double patenting rejection is appropriate where

the conflicting claims are not identical, but at least one examined application

claim is not patentably distinct from the reference claim(s) because the examined

application claim is either anticipated by, or would have been obvious over, the

reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed.

Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In*

*re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686

F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel,* 422 F.2d 438, 164 USPQ

619 (CCPA 1970); and  *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA

1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).


Claim 13 is provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 8 of copending application No. 12/180988 in view of Gehr et al. (U.S. Patent No. 5828847).  Although the conflicting claim is not identical, they are not patentably distinct from each other because both systems comprise substantially the same elements.  For example, claim 1 of the present application recited the elements of application server configured to receive client request and configured to selectively provide server responses to said client requests, and a status hub configured to receive usage message and responsively publish system status messages are the same and obvious as the elements of claims 1, 8 of the copending application No. 12/180988.  In addition, claims 1, 8 of the copending application No. 12/180988 did not specifically teach initializing a return timer, when said return timer exceed exceeds a time threshold for said alternative

handler, routing requests to said handler, automatically adjusting said time

threshold based upon a period using said handler, detecting an overload

condition for said alternative handler, directing requests to another alternative

handler, starting another return timer, and when said another return timer

exceeds a time threshold for said another alternative handler, routing requests to

said handler, and automatically adjusting said time threshold for said another

alternative handler based upon a period using said alternative handler. However,

Gehr (U.S. Patent No. 5828847) teaches initializing a return timer (col. 6, lines

49-52), when said return timer exceed exceeds a time threshold for said

alternative handler (col. 6, lines 49-67), routing requests to said handler (col. 6,

lines 37-43), automatically adjusting said time threshold based upon a period

using said handler (col. 6, line 67 through col. 7, line 3), and an automatic and

dynamically system switches servers in response to an overload condition (col. 3,

lines 12-14), and according to Gehr fig. 5B, step 516, the client selected the

alternative server by read alternative server ID, set a period timer for the

alternative server (step 517), then the flow link back to step 506 where the

alternative server received the requests and process the requests, at the same

time also set the timeout timer and look for exception (step 513), when the

exception detect (i.e. overload condition, col. 6, lines 59-63), direct the requests

to another handler, and all the steps in fig. 5B repeated until the requests is

completes or until the original server is back to operations state (the original

server capable of handling the requests), then the flow end and exit at step 510.

It would have been obvious to one of an ordinary skill in the art at the time the

invention was made to have recognized that the flow shown steps as indicated in

fig. 5B, incorporated with the disclosed Gehr's system that the system is an

automatic and dynamically system switches servers in response to an overload

condition would teaches the steps of detecting an overload condition for said

alternative handler, directing requests to another alternative handler, starting

another return timer, and when said another return timer exceeds a time

threshold for said another alternative handler, routing requests to said handler,

and automatically adjusting said time threshold for said another alternative

handler based upon a period using said alternative handler. Therefore, one

would have been motivated at the time the invention was made to have

combined the teaching of the copending application No. 12/180988 with Gehr's

system to provide a system with maximum server availability and load balancing

for the client processes within minimum processing and administrative overhead

(Gehr, col. 1, lines 9-12).

This is a <u>provisional</u> obviousness-type double patenting rejection.


## *Claim Rejections - 35 USC § 101*

5.      35 U.S.C. 101 reads as follows:

> Whoever invents or discovers any new and useful process, machine, manufacture, or
> composition of matter, or any new and useful improvement thereof, may obtain a patent
> therefor, subject to the conditions and requirements of this title.

6.      Claim 13 is rejected under 35 U.S.C. 101 because the claimed invention is

directed to non-statutory subject matter.

7.      Claim 13 is rejected under 35 U.S.C. 101 because the claimed invention

are directed to system claim, but appearing to be comprised of <u>software alone</u>

without claiming associated <u>computer hardware</u> required for execution.  For

example, claim 13 recited application server configured to receive client requests

and selectively provide server responses to client requests, a status hub

configured to receive usage messages and responsively publish system

messages, a handler selector configured to select a handler, a return timer, all of

which according to the specification paragraphs [0024], [0045] are software

modules.  The system contained only software modules are software per se.

Software per se alone is non-statutory.  Therefore, claim 13 is directed to a non-

statutory subject matter.


### Claim Rejections - 35 USC § 112

8.      The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly
> claiming the subject matter which the applicant regards as his invention.

9.      Claims 1 and 18 are rejected under 35 U.S.C. 112, second paragraph, as

being indefinite for failing to particularly point out and distinctly claim the subject

matter which applicant regards as the invention.

      a.      as per claim 1, lines 9-10, it is not clearly understood what is meant

      by "automatically adjusting said time threshold based upon a period using

      said handler" (i.e. adjusting said time threshold for the handler or for the

      alternative handler).  Appropriate correction is required.

b.      as per claim 18, it is having the same deficiency as claim 1.

Appropriate correction is required.

### *Claim Rejections - 35 USC § 103*

10.    The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

11.    Claims 1, 13, and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gehr et al. (hereafter Gehr) (U.S. Patent No. 5828847).

12.    As per claim 1, Gehr teaches the claim invention substantially as claim including a method of handling requests within an automatic system (col. 3, lines 7-26), the method comprising the steps of:

handling requests with a handler (fig. 5b, steps 506 and 507, the server handling the requests);

detecting an overload condition for said handler (fig. 5B, step 514; col. 6, lines 59-63);

directing requests to an alternative handler (col. 4, lines 51-54; col. 9, lines 9-10);

initializing a return timer (col. 6, lines 49-52);

when said return timer exceed exceeds a time threshold for said

alternative handler (col. 6, lines 49-67), routing requests to said handler (col. 6,

lines 37-43);

automatically adjusting said time threshold based upon a period using said

handler (col. 6, line 67 through col. 7, line 3).


Gehr did not specifically teach in details the step of detecting an overload

condition for said alternative handler, directing requests to another alternative

handler, starting another return timer, and when said another return timer

exceeds a time threshold for said another alternative handler, routing requests to

said handler, and automatically adjusting said time threshold for said another

alternative handler based upon a period using said alternative handler.


However, Gehr disclosed an automatic and dynamically system switches

servers in response to an overload condition (col. 3, lines 12-14), and according

to Gehr fig. 5B, step 516, the client selected the alternative server by read

alternative server ID, set a period timer for the alternative server (step 517), then

the flow link back to step 506 where the alternative server received the requests

and process the requests, at the same time also set the timeout timer and look

for exception (step 513), when the exception detect (i.e. overload condition, col.

6, lines 59-63), direct the requests to another handler, and all the steps in fig. 5B

repeated until the requests is completes or until the original server is back to

operations state (the original server capable of handling the requests), then the

flow end and exit at step 510.


It would have been obvious to one of an ordinary skill in the art at the time

the invention was made to have recognized that the flow shown steps as

indicated in fig. 5B, incorporated with the disclosed Gehr's system that the

system is an automatic and dynamically system switches servers in response to

an overload condition would teaches the steps of detecting an overload

condition for said alternative handler, directing requests to another alternative

handler, starting another return timer, and when said another return timer

exceeds a time threshold for said another alternative handler, routing requests to

said handler, and automatically adjusting said time threshold for said another

alternative handler based upon a period using said alternative handler.

Therefore, one would be motivated to utilize Gehr's system to provide maximum

server availability and load balancing for the client processes within minimum

processing and administrative overhead (Gehr, col. 1, lines 9-12).


13.     As per claim 13, it is system claim that corresponding to method claim 1.

Therefore, it is rejected for the same reason as method claim 1 above.  In

addition, Gehr teaches an application server configured to receive client requests

and configured to selectively provide server responses to said client requests

(fig. 3, item Si, S2, S3, server configured to receive client requests, fig. 5B, step

508, server response to client), and status hub configured to received usage

message and responsively publish system status messages (col. 3, lines 20-23; col. 6, lines 9-11).

14.      As per claim 18, it is machine readable storage claim that corresponding to method claim 1.  Therefore, it is rejected for the claim reason as method claim 1 above.

## *Conclusion*

15.      The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Hashimoto (U.S. Patent No. 7356581), Sim (U.S. Publication No. 2002/0083118), and Dias et al (U.S. Patent No. 6119143) disclosed that based on the detecting of the overload of a request handler, sending the requests to another handler to balance the load among the handler.

Farel et al (U.S. Patent No. 5067074) disclosed a method for throttling overload traffic to a particular destination.

Aaker et al. (U.S. Patent No. 5930252) disclosed a method for triggering data flow streams based upon response time.

Shahidi et al (U.S. Publication No. 2008/0198871) disclosed a dynamic adjustment of inactive timer control threshold for call control transactions.

Banerjee et al (U.S. Publication No. 2008/0126539) disclosed a method for dynamically control thread pool by monitoring thread usage.

Welsh et al ("Adaptive Overload Control FCor Busy Internet Serves", Intel

Research, 2003, pages 1-14) disclosed a method for controlling overload for

servers based upon the time responses to the requests.


16.    Any inquiry concerning this communication or earlier communications from

the examiner should be directed to JENNIFER N. TO whose telephone number is

(571)272-7212.  The examiner can normally be reached on M-T 6AM- 3:30 PM,

F 6AM- 2:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the

examiner's supervisor, Meng-Ai An can be reached on (571) 272-3756.  The fax

phone number for the organization where this application or proceeding is

assigned is 571-273-8300.

Information regarding the status of an application may be obtained from

the Patent Application Information Retrieval (PAIR) system.  Status information

for published applications may be obtained from either Private PAIR or Public

PAIR.  Status information for unpublished applications is available through

Private PAIR only.  For more information about the PAIR system, see http://pair-

direct.uspto.gov. Should you have questions on access to the Private PAIR

system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-

free). If you would like assistance from a USPTO Customer Service

Representative or access to the automated information system, call 800-786-

9199 (IN USA OR CANADA) or 571-272-1000.

/Meng-Ai An/
Supervisory Patent Examiner, Art Unit 2195

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